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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

DOCKET NO. 71 - 1181

In The Matter of the Application
of
ELSIE H. FLANAGAN and NINNA MURRAY,

Petitioners,

vs.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 6 OF THE TOWN OF SOUTHAMPTON, NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Board of Education of Union Free School District No. 6 of the Town of Southampton, New York, respectfully prays that the petition herein for Writ of

Certiorari to the Appellate Division, Third Department, of the State of New York, be denied.

OPINIONS BELOW

The decision of the Commissioner of Education of the State of New York was rendered on March 23, 1971, and officially reported and designated as decision No. 8256; 10 Education Department Reports ___ (A-22)*

The decision of the New York Supreme Court, Albany County, was handed down on June 23, 1971. and officially reported in 66 Misc. 2d 736 (Petitioners Appendex 22). Said Supreme Court's decision on petitioners motion for reargument was handed down on July 13, 1971, and is not officially reported (Petitioners Appendex 25).

The Appellate Division, Third Department, New York, unanimously affirmed the decision of the New York Supreme Court by opinion dated December 20, 1971, (A-30) which is officially reported in 38 A.D. 2d 645.

Petitioners motion in the said Appellate Division, Third Department for permission to appeal to the Court of Appeals of the State of New York was denied without opinion.

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*Numbers in parentheses refer to the Appendex hereto unless otherwise noted.

Respondents motion to dismiss the appeal taken by petitioners to the Court of Appeals was granted by said Court on the ground that no substantial constitutional question is involved.

PROCEEDINGS BELOW

The decision of the Commissioner of Education of the State of New York was rendered on March 23, 1971.

The decision of the Supreme Court of the State of New York, Albany County, dismissing the petition herein was rendered on June 23, 1971; judgment was entered thereton on July 7, 1971, and a copy thereof with notice of entry was served upon all parties on July 7, 1971.

The decision of the Appellate Division of the Supreme Court of the State of New York, Third Department, unanimously affirming the aforesaid Supreme Court judgment of July 7, 1971, was rendered on December 20, 1971; an order was entered thereon on December 24, 1971, and judgment entered thereon on December 27, 1971; copies of said order and judgment with notice of entry thereof were served upon all parties hereto on December 27, 1971.

By Notice of Appeal dated December 30, 1971, petitioners attempted to take an appeal to the Court of Appeals of the State of New York as a matter of right, relying solely on an alleged constitutional ground, to wit, that the failure

to provide absentee ballots in school district elections violates the equal protection clause of the Fourteenth Amendment to the United State Constitution and the Constitution of the State of New York. Respondent's motion to dismiss said appeal was granted as aforesaid by order of the Court of Appeals dated February 10, 1972, and a judgment was entered thereon on March 2, 1972. A copy of said order with notice of entry was served on all parties hereto on February 29, 1972. A copy of said judgment and order together with notice of entry thereof was served on all parties hereto on March 6, 1972.

Petitioners motion in the Supreme Court of the State of New York, Appellate Division, Third Department for permission to appeal to the Court of Appeals was denied by said Appellate Division by order dated and entered February 16, 1972. Judgment was entered thereon on February 17, 1972. Copies of said order and judgment with notice of entry thereof were served upon all parties hereto on February 18, 1972.

Petitioners have not made any motion in the Court of Appeals of the State of New York, nor in any way sought leave of said Court for permission to appeal to the said Court of Appeals.

QUESTIONS PRESENTED

Respondent submits that there is no constitutional question properly before this Court.

STATEMENT OF THE CASE

The above entitled proceeding was brought by petitioners to set aside the determination of the Commissioner of Education of the State of New York dated March 23, 1971, wherein said Commissioner of Education dismissed an appeal taken by petitioners and one Charlotte Harris seeking to set aside the action taken at a special school district meeting of Union Free School District No. 6, Town of Southampton, Suffolk County, New York, held on October 31, 1970. The purpose of said meeting was to secure voter approval of a proposition authorizing the construction of an addition to the District's High School building, the conversion of the resulting structure into an Intermediate School, the construction of a new High School, and to authorize the issuance of bonds to finance the two projects at a total estimated cost of not to exceed $8,985,000.00.

Four prior school building and/or land acquisition propositions had been turned down by the voters. The Board of Education thereupon developed the comprehensive building program which was submitted to the voters as a single proposition as above set forth.

The notice of special meeting was published in the Southampton Press on October 1, 8, 15, 22, and 29, 1970. In addition the School District conducted an extensive program designed to inform the voters of the nature of the proposition, the date, time and place of registration and the date, time and place of voting.

The final registration rolls for the meeting listed 2994 registerd voters; 2245 of whom voted at the meeting, representing the largest voter turnout ever in the District. The result of the voting was as follows: Total number of ballots cast, 2245; Total number of blank ballots, 59; Total number of ballots cast in favor of the proposition, 1238; Total number of ballots cast against the proposition, 948.

No voter requested an absentee ballot. No facts were alleged nor any proof offered by petitioners in the proceedings below that any qualified voter was denied the right to vote and the record supports the finding by the Commissioner of Education that it did not appear that there were any qualified voters not present in the district on the day of the election. No voter was challenged as unqualified to vote either at or before the election.

The Commissioner of Education ruled that there was no right to an absentee ballot in a school district election, that a comprehensive plan could be voted upon as a single proposition, that the

publication of the notice of meeting was valid, that the activities of the Board of Education in supporting the proposition were valid, and that since no alleged unqualified voter was challenged, there was no reason to set aside the election.

In the Article 78 Proceeding commenced by petitioners in Supreme Court, Albany County, New York, to review the determination of the Commissioner of Education, the Court at Special Term held that the procedures employed by the Commissioner of Education were proper and that an opportunity to present oral testimony was not required; in view of the limited area of judicial review available, there was no basis upon which the Commissioner's decision may be disturbed; that the right to vote was not denied any qualified voter; the failure to provide absentee ballots in a school district election does not constitute a denial of equal protection of either federal or state law; and that a comprehensive school building program may be presented to the voters as a single proposition.

The Appellate Division unanimously affirmed the lower Court judgment, noting that the Commissioner of Education specifically found that there was no constitutional infirmity as to the election in question by virtue of the fact that absentee ballots are not provided for in school district elections. The Court specifically determined that petitioners' attempt to raise such a constitutional question in this

proceeding is without merit since the record supports the Commissioner's findings that it did not even appear that there were any qualified voters not present in the district on the day of the election.

The Appellate Division further determined that the alleged constitutional issue concerning the use of real property tax for the funding of school districts, was not raised by petitioners in the prior proceeding and therefore was not properly before the Court and did not decide same.

POINT I

PETITIONERS HAVE NOT EXHAUSTED THEIR REMEDIES FOR REVIEW IN THE COURTS OF NEW YORK

As heretofore pointed out in the statement of Proceedings Below, although petitioners sought permission from the Appellate Division, Third Department for leave to appeal to the Court of Appeals, no application has been made by petitioners to the Court of Appeals itself for such permission.

Section 5602(a) of the Civil Practice Law & Rules of New York makes provision for taking an appeal to the Court of Appeals by permission of the Appellate Division before application to the Court of Appeals, or by permission of the Court of Appeals upon refusal by the Appellate Division or upon direct application to the Court of Appeals. Where permission to appeal to the Court of Appeals has been denied by the Appellate Division, petitioners' motion in the Court of Appeals for permission to appeal must be made within thirty days from the date of services of a copy of the Appellate Division's order denying permission to appeal with notice of entry. Section 5513(c), N.Y. Civil Practice Law & Rules.

Inasmuch as petitioners have not exhausted all their remedies for review by the Court of Appeals of the State of

New York, their present petition for a writ of certiorari is not properly before this Court and should be dismissed.

McMaster v. Gould, 276 US 284, 72 L Ed 574, 48 S Ct 299

Stratton v. Stratton, 239 US 55, 36 S Ct 26, 60 L Ed 142

Matthews v. Huwe, 269 US 262, 46 S Ct 108, 70 L Ed 266

Southern Electric Co. v. Stoddard (Beha) 269 US 186, 46 S Ct 71, 70 L Ed 227

Leach v. Peo. of the State of California, 283 US 808, 75 L Ed 1427

Banks v. California, 395 US 708, 89, S Ct 1901, 23 L Ed 2d 653

Although petitioners attempted a direct appeal to the New York Court of Appeals as a claimed matter of right solely on alleged constitutional grounds, pursuant to section 5601(b) of the Civil Practice Law & Rules, concerning a claimed right to absentee ballots in school district elections, said appeal was dismissed on respondent's motion, and no attempt has been made by petitioners to seek permission from said Court of Appeals for leave to appeal to said Court for any reason whatsoever, even for the second reason advanced by petitioners in their present petition, to wit, petitioners contention that a hearing should

be directed as to the question of disparity between certain school districts as to the amount of money being spent on a per pupil basis in regard to the equality of education.

POINT II

PETITIONERS ALLEGED CONSTITUTIONAL QUESTION CLAIMING A RIGHT TO A HEARING TO ESTABLISH DISPARITY BETWEEN SCHOOL DISTRICTS IN THE DISBURSEMENT OF FUNDS AND THE USE OF REAL PROPERTY TAX FOR THE FUNDING OF EDUCATION IS NOT PROPERLY BEFORE THIS COURT, NOT HAVING BEEN RAISED IN THE PLEADINGS AND PROCEEDINGS BELOW.

As noted in the decision of the Appellate Division, Third Department, petitioners' contention that a hearing should be directed as to the question of disparity between certain school districts as to the amount of money being spent on a per pupil basis in regard to the equality of education, was not even raised in the proceedings below and the issue was not properly before the Court. The record herein discloses that the only issue before the Commissioner of Education and the New York Supreme Court was whether or not the special district meeting of October 31, 1970, was conducted as provided by law. It should be noted that petitioners' argument for an evidentiary hearing on the aforesaid disparity question was urged by them for the first time in their brief in the Appellate Division, and was no doubt prompted by a recent California State Supreme Court decision concerning the use of real property taxes for education.

It is submitted that where the

claimed federal question has not been properly raised, preserved or passed upon in the state courts below, the United States Supreme Court will not entertain a petition for a writ of certiorari based upon same.

Warfield v. Chaffe, 91 US 690, 23 L Ed 383

Louisville & Nashville R. Co. v. Woodford, 234 US 46, 34 S Ct 739, 58 L Ed 1202

Cardinale v. Louisiana, 394 US 437, 89 S Ct 1162, 22 L Ed 398

DeBacker v. Brainard, 90 S Ct 163, 396 US 28, 24 L Ed 2d 148

Lynch v. New York, 293 US 52, 55 S Ct 16, 79 L Ed 191

POINT III

NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS DIRECTLY INVOLVED HEREIN

The other constitutional grounds upon which petitioners seek an appeal to this Court is that the failure to provide absentee ballots in a school district election violates the equal protection clause of the Fourteenth Amendment and the New York State Constitution.

As noted in the decision of the Commissioner of Education (A-22) and the unanimous decision of the Appellate Division (A-30), the attempt to raise such a constitutional issue in this proceeding is without merit since the record herein supports the finding that it does not appear that there were any qualified voters not present in the district on the day of the election. Since there is nothing in the record to indicate that any qualified voter, including petitioners, was denied the right to vote, by absentee ballot or otherwise, it is respectfully submitted that petitioners have no standing and are seeking the review of an abstract question, the determination of which cannot in any way alter or effect the outcome of the subject school district election.

In effect the Appellate Division found that the petitioners raising such a constitutional issue in the proceeding below was merely an attempt, unsupported by the record, and the Court found it

unnecessary to even pass upon the alleged constitutional question. It is submitted that a mere attempt to raise a constitutional question is not sufficient, that the claimed constitutional question must in fact be a real, direct and substantial one and that the Supreme Court will not pass upon abstract propositions or declare principles or rules of law which cannot effect the matter in issue in the case before it.

Local No. 8-6, Oil, Chemical & Atomic Workers Int. Union, AFL-CIO v. Missouri, 361 US 363, 4 L Ed 2d 373, 80 S Ct 391

Kimball v. Kimball, 174 US 158, 19 S Ct 639, 43 L Ed 932

It is further submitted that no substantial constitutional question is directly involved herein, for the reason that the claimed constitutional question involves not the right to vote itself, but merely a method of exercising it. This issue, involving the claimed right to an absentee ballot, has already been authoritatively decided by the Supreme Court of the United States in McDonald v. Board of Elections Commissioners of Chicago, 394 US 802, 22 L Ed 2d 739, 89 S Ct 1404, wherein the Court analyzed the Standards of Equal Protection and found that there had been no violation of equal protection by an Illinois statute which made absentee ballots available to some persons but not certain others.

A petition for a writ of certiorari based upon alleged constitutional grounds should be dismissed where the question has already been authoritatively settled.

Rule 19 1(a), Rules of the Supreme Court of the United States

Minneapolis, St. P. & S.S.M. Ry. Co. v. C. L. Merrick Co., 254 US 376, 41 S Ct 142, 65 L Ed 312

Utley v. St. Petersburg, 292 US 106, 54 S Ct 593, 78 L Ed 1155

POINT IV

PETITIONERS HAVE FAILED TO ESTABLISH JURISDICTION FOR A REVIEW ON WRIT OF CERTIORARI

Rule 19 1(a) of the Rules of this Court sets forth the basic character of the reason to be considered by this Court in granting or denying review on writ of certiorari. It is respectfully submitted that the petition herein in no way sets forth or establishes that a state court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in any way probably not in accord with applicable decisions of this Court.

As heretofore pointed out, the Appellate Division found petitioners' claimed constitutional questions to be absolutely lacking in merit and unsupported by the record below, and further found it unnecessary to pass upon same.

Nowhere does the petition herein even allege that the State Court decided the matter in any way not in accord with the applicable decisions of this Court. Respondent submits that McDonald v. Board of Elections, etc., supra, is the controlling decision of this Court on the question of the right to absentee ballots and petitioners have not seen fit to even cite the McDonald decision of this Court or attempt to distinguish same from the present case. In fact, the only reference to McDonald in petitioners' brief is a quotation from the District Court decision in said case.

The petiton herein further fails to comply with Rule 23 of the rules of this Court in that

1. the petition does not set forth or refer to the opinion of the Appellate Division, Third Department (A-30) or the opinion of the Commissioner of Education (A-22) as required by Rule 23 1(a) and (i), and states that the Appellate Division, Third Department affirmed without opinion, whereas said Court did in fact render a written opinion.

2. Petitioners' statement of the case fails to specify the stage in the proceeding at which and the manner in which the claimed federal questions were raised, the method of raising them and the way they were passed upon, as required by Rule 23 1 (f).

   In fact, it is respectfully submitted that the claimed federal question concerning the alleged right to a hearing to determine disparity between school districts and the use of real property taxes for funding school districts was not even alleged in the pleadings or arguments before the Commissioner of Education or the New York Supreme Court at Special Term. This argument appeared for the first time in petitioners' brief upon the argument of the appeal

before the Appellate Division and as that Court stated, the issue was not properly before the Court and therefore not decided by the Court.

Respondent respectfully submits that the petition for a writ of certiorari should be denied for the reason that petitioners have not demonstrated why review should be granted in terms of public importance. Petitioners claim that there has been a deprival of a constitutional right. But who has been so deprived? Certainly as the State Court opinions indicate, there is nothing in the record to support petitioners claim of injury. They appear to be arguing an abstract question on behalf of hypothetical persons other than themselves.

It is submitted that petitioners' sole purpose in attempting to seek a writ of certiorari herein is to further harass and delay respondent Board of Education in proceeding with the construction project and bond issue approved by the voters of the district on October 31, 1970. Since the inception of this proceeding by way of the appeal to the Commissioner of Education, petitioners whole course of conduct has been one of constant delay, at one time necessitating a motion in the Appellate Division by respondent to dismiss the appeal for petitioners' failure to prosecute same within the time prescribed by the rules of that Court.

Since obtaining voter approval as aforesaid, respondent Board of Education has completed plans and specifications and received competitive bids on the construction project approved by the voters, but is unable to award contracts, sell bonds or issue bond anticipation notes because of the pending litigation.

Respondent submits that this proceeding and any attempt at a further view herein is frivolous and wholly without merit, and that petitioners sole purpose is to harass and delay the construction project. Petitioner Murray has openly declared that it is her intention to hold up construction for as long as two years. The delay caused by the pending litigation and petitioners attempts to seek a further review will cause irreparable damage to the School District in the form of increased construction costs and higher interest rates on bonds.

It is further submitted that the present petition is so groundless as to present an appropriate case for the awarding of reasonable damages to Respondent Board of Education for the delay occasioned by this proceeding, pursuant to subdivision 4 of Rule 56 of the Rules of this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS J. BOURKE
Attorney for Respondent Board of Education of Union Free School District No. 6, Town of Southampton

APPENDIX.

EXHIBIT A.

Decision of the Commissioner of Education of the State of New York

No. 8256

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

Before the Commissioner

IN THE MATTER
of the

Appeal of ELISE H. FLANAGAN, CHARLOTTE HARRIS and MINNA MURRAY from the action of the Board of Education of Union Free School District No. 6 of the Town of Southampton, Suffolk County in relation to the conduct of a special district meeting.

Bennett E. Aron, Esq....Attorney for Petitioners

Thomas J. Bourke, Esq...Attorney for Respondent

Petitioners seek an order setting aside the action taken by a special district

meeting on October 31, 1970. The purpose of this meeting was to secure voter approval of a proposition to authorize the construction of an addition to respondent's high school building, the conversion of the resulting structure into an intermediate school, the construction of a new high school, and to authorize the issuance of bonds to finance these two projects. The voters of the district approved the proposition by a vote of 1,238 to 984.

Petitioners urge the invalidation of the meeting on the ground that the failure to provide absentee ballots violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. The relevant portion of the amendment states:

> "Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

The New York State Constitution makes provision for absentee ballots in Article 2, section 2.

> "The Legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters

> who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes."

It should be noted that the language of the section is permissive rather than mandatory. The Legislature has provided for the use of absentee ballots in general elections by section 117 of the Election Law. In the absence of a specific provision for absentee ballots in the Education Law, the question arises as to whether they must be used in school elections. On various occasions the courts of this State have distinguished school district elections from general elections. The Appellate Division of the Supreme Court has held that school district elections are not elections within the meaning of Article 2 of the Constitution (Berge v. Hollister, 275 App. Div. 852). The Court of Appeals in In re Gage (141 N.Y. 112) reached the same conclusion.

The question of absentee ballots in school district elections has been specifically considered by the courts.

> "Moreover section 117 of the Election Law refers to the board of central registration, fixes a time limit for absentee ballot applications inconsistent with

the time schedule normally followed in school district elections, and speaks in terms of personal registration, which in many school districts is not required. It is, thus, made clear that the Legislature when it provided in subdivision 1 of section 2609 of the Education Law that school district elections 'shall be conducted, so far as may be, in accordance with the provisions of the election law' did not intend to make the absentee ballot provisions of the election law applicable to school districts." Savage v. Board of Education City of Glen Cove School District (29 Misc. 2d 725, at 726; 8 AD 2d 911; 7 NY 2d 706.)

In support of their contentions petitioners argue that implicit in the decision of the United States Supreme Court in Kramer v. Union Free School District No. 15 (395 U.S. 621) is a finding that school district meetings are elections within the meaning of the State Constitution. The Supreme Court in Kramer scrutinized section 2012 of the Education Law, and concluded that the requirement of that statute that an otherwise qualified voter must also own or lease real property in the district or be the parent or have custody of children enrolled in the local public schools was violative of the equal protection

clause of the Fourteenth Amendment. The court was careful to point out that the case involved an absolute denial of the franchise. This situation was expressly distinguished from that of a claimed right to an absentee ballot.

The right to an absentee ballot was considered in McDonald v. Board of Education Commissioners of Chicago (394 U.S. 802). That case involved unsentenced inmates of Cook County jail who were unable to appear at the polls and were not included in various classes of persons entitled to absentee ballots by Illinois statute. The decision of the court rests on the distinction between a statute which denies the franchise and a statute which merely makes voting more available to some groups who cannot easily get to the polls. Where denial of the franchise is involved, the court as in Kramer (supra), will apply a more stringent evaluation of the statutory classifications and the underlying state interests. However, in the absentee ballot situation the more traditional standards are to be applied to a claim of denial of equal protection of the laws.

In the present appeal no valid claim of disfranchisement has been advanced. Petitioners have argued that some people, particularly those who maintain summer homes in the district, were not present in the district on the day of the special meeting and thus could not vote. It has not been established that these individuals were qualified voters of the district.

A person can have only one residence or domicile which is the place of permanent residence or home. Op. Atty Gen. (51 St. Dept. 123 (1934), Matter of Beck (74 St. Dept. 78 (1953). There is nothing in Kramer (supra) or McDonald (supra) which supports petitioners' claim of a denial of the equal protection of the laws.

Petitioners also contend that the form of the ballot used in the special district meeting was defective. The construction program and the financing thereof were presented as a single proposition, whereas petitioners argue that four separate questions relating to these matters should have been placed on the ballot pursuant to section 2022, subdivision 2 of the Education Law. This section, which is applicable to a vote taken during the annual meeting of the district, provides that a majority of the qualified voters present at the meeting may determine to vote separately the necessary funds for specific items in the budget. It is not applicable to a special district meeting called for the approval of building projects. In a case decided prior to the addition of subdivision 2 to section 2022, the Supreme Court of Nassau County held that a school board could include a comprehensive program for school development in a single proposition Corbett v. Union Free School District No. 21, Town of Hempstead (199 Misc. 930).

It is further alleged that notice of the special meeting was defective in that

it was published in only one newspaper instead of two newspapers as required by section 2004 of the Education Law. Respondent argues that there is only one newspaper of general circulation within the district. Section 2010 states that the proceedings of a district meeting shall not be invalidated for lack of due notice unless the omission to give such notice was wilful and fraudulent. Petitioners have failed to establish fraud or wilfulness. Furthermore, the extensive voter participation refutes the contention that voters were not notified of the meeting. As has been indicated in the past, the results of such a meeting will not be invalidated if there has been a good voter turnout (Matter of Knodt, 6 Ed. Dept. Rep. 49 (1966)).

The activities of the board of education in support of the proposition have also come under attack by the petitioners. These allegations, likewise, are untenable. Boards of education are obligated to disseminate information concerning school budgets or proposed programs so that the voters can make an informed choice (Matter of Smith, 7 Ed. Dept. Rep. 107 (1968)).

Finally, the petitioners have alleged that various unqualified persons were allowed to vote. Respondent contends that no voter was challenged. The failure to challenge allegedly unqualified voters is dispositive of the matter. If, furthermore, unqualified voters were allowed to vote without challenge, the

meeting would, in any event, not be set aside unless there exists a reasonable probability that the results of the election would be changed by the elimination of the illegal votes (Boyes v. Allen, 32 App. Div. 2d 990). No proof that unqualified voters participated in the district meeting having been presented, I will not set aside the actions taken at the meeting.

THE APPEAL IS DISMISSED.

IN WITNESS WHEREOF, I, Ewald B. Nyquist, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 23rd day of March, 1971.

SEAL

/s/ Ewald B. Nyquist

Commissioner of Education

EXHIBIT B.

Decision of Supreme Court-Appellate Division, Third Department

SUPREME COURT-APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

December 20, 1971. 17738

In the Matter of Elsie H. Flanagan et al.,
Appellants,

v.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York,
Respondent,

and

BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 6 OF THE TOWN OF SOUTHAMPTON,
Intervenor-Respondent.

Appeal by the petitioners from a judgment of the Supreme Court at Special Term, entered in Albany County on July 7, 1971, which dismissed the petition herein upon the merits.

The petitioners contested by way of an appeal to the respondent commissioner the validity of a school district election at which the voters of the district approved a certain building program and the issuance of bonds to fund the project. The Commissioner refused to set aside the results of the elction. The Commissioner specifically found that there was no constitutional infirmity as to the election in question by virtue of the

fact that absentee ballots are not provided for in school district elections. Among other things, he noted that it did not appear that there were any qualified voters not present in the district on the day of the election, and that finding is supported by the record. Accordingly, the petitioners' attempt to raise such a constitutional issue in this Article 78 proceeding is without merit.

The petitioners further content upon this appeal that a hearing should be directed as to the question of disparity between certain school districts as to the amount of money being spent on a per pupil basis in regard to the equality of education. This question was not properly raised in the prior proceedings and would appear to go to the issue of the constitutionality of a real property tax for the funding of school districts. The issue is not properly before us and we do not decide the same.

There is no showing that the Commissioner has erred as a matter of law or that his determination was otherwise purely arbitrary. (Cf. Matter of Board of Educ., Cent. School Dist. No. 2, Town of Oyster Bay v. Nyquist, 36 A D 2d 199, 201.)

Judgment affirmed, without costs.

HERLIFHY, P.J., REYNOLDS, GREENBLOTT, SWEENEY and SIMONS, JJ., concur.